United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1263

To be argued by
PETER A. CLARK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1263

UNITED STATES OF AMERICA,

Appellee,

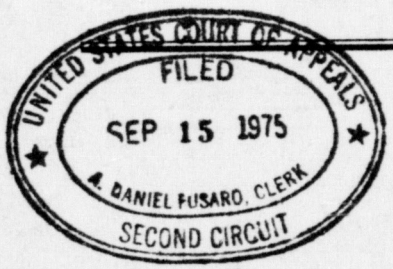
—v.—

PASQUALE DAVERSA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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Statement of the Case

This is an appeal from a judgment of conviction in the District of Connecticut entered by the Court (Newman, *J.*) on May 14, 1975, after jury verdicts of guilty on April 17, 1975.

On June 20, 1974, a grand jury in New Haven, Connecticut returned a three count indictment (Criminal No. N-74-63) charging appellant Pasquale Daversa with the following offenses: receipt of a firearm by a convicted felon [18 U.S.C. App. 1202(a)(1)]; aiding and abettig the interstate shipment of stolen firearms [18 U.S.C. 922(i) and 2(a)]; conspiracy to ship stolen firearms in interstate commerce [18 U.S.C. 371]. Pleas of not guilty were entered to all counts on July 1, 1974.

On July 25, 1974, the same grand jury returned a one count indictment (Criminal Number N-74-81) charging Daversa with conspiracy to ship stolen firearms in interstate commerce [18 U.S.C. 371], which indictment alleged the same offense as count three of Number N-74-63 but corrected a technical defect thereof. Daversa entered a not guilty plea to this indictment on September 16, 1974, and count three of Number N-74-63 was dismissed by oral motion. The two indictments were then consolidated for trial.

After motions were completed, jury trial of both indictments commenced on April 11, 1975. Verdicts of guilty were returned on all counts on April 17, 1975. On May 12, 1975, Daversa was sentenced to concurrent terms of one year each on count two of Criminal Number N-74-63 and the single count of Criminal Number N-74-81. Imposition of sentence was suspended on the remaining count. A timely appeal followed.

Statutes Involved

18 U.S.C. App. 1202(a)(1)

> (a) any person who—
>
> (1) has been convicted . . . of a felony . . . and who receives . . . in commerce . . . any firearm, shall be fined. . . .

18 U.S.C. 922(i)

> It shall be unlawful for any person to transport . . . in interstate commerce, any stolen firearm . . . knowing or having reasonable cause to believe that the firearm . . . was stolen.

18 U.S.C. 371

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined. . . .

18 U.S.C. 2(a)

> Who ever commits an offense . . . or aids, abets, commands, induces, or procures its commission, is punishable as a principle.

Rule 8 F.R.C.P.

> (a) JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 13 F.R.C.P.

> TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS
>
> The Court may order two or more indictments . . . to be tried together if the offenses . . . could have been joined in a single indictment. . . .

Rule 12(b)(2) F.R.C.P.

> DEFENSES AND OBJECTIONS WHICH MUST BE RAISED
>
> Defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof. . . .

Rule 14 F.R.C.P.

RELIEF FROM PREJUDICIAL JOINDER

> If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment . . . or by such joinder for trial together, the court may order an election or separate trials of counts. . . .

Questions Presented

I. Did Appellant, by failing to move either before or during trial for severance of the count charging receipt of a firearm by a convicted felon, waive his right to appellate review of joinder of the various offenses?

II. Was Appellant, who testified in his own behalf on all counts, prejudiced by joinder of the count charging receipt of a firearm by a convicted felon with other offenses?

Statement of Facts

On September 25, 1973, David Gordon was arrested in Westport, Connecticut, while transporting a load of stolen firearms from Pennsylvania (Tr. 43-45). He thereupon gave a statement to Agent Nadel of the Bureau of Alcohol, Tobacco and Firearms that the weapons were intended for sale to a man in Waterbury, and selected the prospective buyer's picture from a spread of seventeen photographs displayed by the agent (Tr. 58-59). Gordon subsequently cooperated with the Government and testified at trial that he had made another trip to Waterbury from Pennsylvania during the week prior to his arrest with stolen guns (Tr. 46). He was accompanied on this trip by David Hanlon (Tr. 46), who a few days later provided the tip leading to Gordon's arrest on the 25th (Tr. 161).

Upon arrival in Waterbury on the completed trip Gordon contacted Sheila Tracy to help him locate a buyer for his stolen guns and other items (Tr. 47). Tracy called someone named Patsy, who came to Tracy's house and purchased some guns from Gordon (Tr. 49-52). Gordon made a courtroom identification of Appellant as the man to whom this sale was made (Tr. 52) and the photograph he had selected the day of his arrest was in fact that of Daversa (Tr. 209). Gordon had stolen the guns that he actually sold to Daversa in burglaries near Lancaster, Pennsylvania (Tr. 57). He advised Daversa that they were stolen (Tr. 78) and that they came from Pennsylvania (Tr. 54). After the sale was completed, Daversa told Gordon he would take all of the guns he could supply (Tr. 55), and Gordon said he would return with more from Pennsylvania shortly (Tr. 56). It was upon this return trip that he was arrested (Tr. 56).

After the sale to Daversa, Tracy called a Thomas Carulla and arranged for the sale of more of this shipment of Gordon's guns to him (Tr. 82). Two separate sales of one gun each were made to Carulla, including one at his house (Tr. 89-90). In Gordon's initial statement he gave detailed directions to Agent Nadel on how to locate the Carulla home (Tr. 90, 212). Nadel followed these directions and recovered two guns from Carulla (Tr. 212) which were identified at trial by their owner, John Benedict, as having been stolen from his home near Lancaster, Pennsylvania on September 18, 1973 (Tr. 143).

Sheila Tracy testified that on or about September 21, 1973, Gordon had come to her house, accompanied by Hanlon, trying to find a buyer for some of his loot (Tr. 112). Tracy called Daversa, whom she had known for at least ten years (Tr. 113), and advised him Gordon had guns for sale which she described to him as "hot" (Tr. 116). Daversa came to the house and went out to Gor-

don's car with him after discussing the guns (Tr. 113-116). When Daversa left, Tracy called Carulla and arranged the sale of two more Gordon guns as described above (Tr. 117-118).

Hanlon, who was present at all of these transactions, testified to both sales and the conversations with Daversa (Tr. 146-160), whom he identified in court (Tr. 151); Hanlon also recalled that Daversa agreed to pay Gordon in cash for future sales (Tr. 155) because Gordon felt that checks could be traced (Tr. 202).

Daversa testified in his own behalf, admitting the call from Tracy and visit to her house where he met two men with rifles for sale, but denied that he completed the transaction (Tr. 234-238). The Government and Daversa stipulated that he was convicted of receipt of stolen goods on June 6, 1971 in the Superior Court at Waterbury, Connecticut (Tr. 204).

ARGUMENT

I.

A complete failure to move at any time for severance of counts or indictments pursuant to Rules 8, 13 or 14, Federal Rules of Criminal Procedure, constitutes waiver of that issue and precludes appellate review.

Two separate indictments were consolidated for trial in this matter. The first one alleged receipt of a firearm by a convicted felon and another substantive offense. The second alleged conspiracy. For purposes of simplicity a single three count indictment was retyped and presented to the jury. In discussing severance for reasons of mis-

joinder, two rules thus come into play: Rule 8, Joinder of Offenses In a Single Indictment; and Rule 13, Joinder of Indictments for Trial. Since the same arguments and reasoning are applicable to both Rules, both concepts may be considered together. In either case, appellant at no time moved for severance of counts or indictments and has thus conclusively waived any right of appellate review by virtue of the clear language of Rule 12(b)(2), F.R.C.P.[1] See also *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, — U.S. —; *United States* v. *Russo*, 480 F.2d 1228 (6th Cir. 1973); *United States* v. *Daniels*, 437 F.2d 656 (D.C. Cir. 1970); *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969).

Similarly, the failure to move at any time for severance on the basis of prejudice pursuant to Rule 14, F.R.C.P., constitutes waiver. *United States* v. *Carson*, 464 F.2d 424, 436 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Sweig*, 441 F.2d 114, 119 (2d Cir. 1971). This is also fairly implied in *Papakadis*, *supra* at 300 where, in finding waiver for failure to move under Rule 8, it was stated that "This is not conclusive, however, where there has been a severance request at trial. In such event Rule 14 picks up where Rule 8 leaves off." The obvious reason why failure to move constitutes waiver under Rule 14 is that a ruling is discretionary, *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966), and in the absence of a motion supported by facts or an offer of proof, the Court's discretion has not been invoked. Such is the case here. Appellant's afterthought should not avail him on appeal.

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[1] DEFENSES AND OBJECTIONS WHICH MUST BE RAISED

Defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof. . . .

II.

Assuming *arguendo* that severance can be raised for the first time on appeal, Appellant was in no way prejudiced by joinder of the count charging receipt of firearms by a convicted felon with other offenses.

A. The counts are properly joined because they are similar in nature, close in time, and arose from a common scheme or transaction.

The three counts of which Appellant stands convicted are so clearly related in time, proof and similarity that a rational argument about misjoinder under Rule 8 or Rule 13 is inconceivable. There is just no question but that these offenses, all occurring within a few days of each other, arising from a common scheme with common participants and involving very similar offenses provable by the same witnesses, are properly joined in the first instance. See *United States* v. *Williamson*, 482 F.2d 508 (5th Cir. 1973); *Conte* v. *Cardwell*, 475 F.2d 698 (6th Cir. 1972), *cert. denied*, 414 U.S. 873 (1973); *Bradley* v. *United States*, 433 F.2d 1113, 1116 (D.C. Cir. 1969); *Blunt* v. *United States*, 404 F.2d 1283, 1288 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 909 (1969); *Baker* v. *United States*, 401 F.2d 958, 971 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); *Drew* v. *United States*, 331 F.2d 85 (D.C. Cir. 1964); *United States* v. *Lotsch*, 102 F.2d 35 (2d Cir. 1939).

B. No criminal propensity prejudice attaches from proof of a prior felony introduced as an element of the offense of receipt of a firearm by a convicted felon when a defendant voluntarily testifies on all counts, since proof of the prior felony would be admissible for impeachment at a separate trial.

Even where joinder is proper at the outset, severance may become appropriate pursuant to Rule 14 for prejudice shown. *Drew* v. *United States*, *supra* at 87. Appellant's contention here, if interpreted correctly, is that introduction of the prior felony conviction as an element of the offense of receipt of a firearm by a convicted felon irretrievably prejudiced him on the other counts. Despite the fact that Appellant not only failed to move for a severance on this basis, but also stipulated to its admission, we can assume for the sake of argument that there may be some duty on the court to sever *sua sponte* in the face of obvious prejudice. *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960). Nevertheless, joinder of the receipt offense with other offenses has specifically been found not to be unduly prejudicial. *United States* v. *Abshire*, 471 F.2d 116 (5th Cir. 1972); *United States* v. *Lee*, 428 F.2d 917 (6th Cir. 1970), *cert. denied*, 404 U.S. 1017 (1972). This is particularly true where, as here, the jury is carefully instructed on the purpose of introduction of the prior crime (App. 167a, 168a, 220a, 221a). The Court instructed both at the time of its introduction and at the conclusion of the case that this offense could not be considered by them as indicating a propensity to commit the crimes charged.

In the single case found of this precise nature in which relief was granted, *United States* v. *Franke*, 331 F. Supp. 136 (D. Minn. 1971), the Court did not go so far as to

sever, but rather held a two stage trial. Relief was prefaced upon the assumption that defendant would *not* testify, and came as a result of a pre-trial motion. Here, however, Appellant actually did testify on all counts, nor at any time did he indicate a desire to do otherwise. From the state of the record it must be presumed that he at all times wished to testify as a matter of trial strategy, and no basis exists to conclude that he would have done otherwise in separate trials, in which event the prior felony could have been used at least for impeachment. Since the other crime would be admissible at separate trials, no prejudice accrued from trial together. *United States* v. *Baker*, *supra* at 974; *Blunt* v. *United States*, *supra* at 1288; *Drew* v. *United States*, *supra* at 91.

CONCLUSION

For the foregoing reasons, Appellant received a fair trial in which all counts were properly joined, and it is urged that the convictions be affirmed.

Respectfully submitted,

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v.

PASQUALE DAVERSA
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

LOUIS PINTO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71 Street BROOKLYN, N.Y.

That on the 15TH day of SEPTEMBER, 1975, deponent served the within BRIEF FOR APPELLEE upon W. PAUL FLYNN, ESQ., 132 TEMPLE ST. NEW HAVEN, CONN. DAVID GOLDMAN, ESQ., 129 CHURCH ST. NEW HAVEN, CONN.

Attorney(s) for the APPELLANT in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me, Louis Pinto

This 15TH day of SEPTEMBER 1975

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977